JD(ATL)–58–04
St. Charles, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

CHICAGO REGIONAL COUNCIL OF CARPENTERS, FORMERLY KNOWN AS CHICAGO AND NORTHEAST ILLINOIS DISTRICT COUNCIL OF CARPENTERS, and the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 916, Individually and Jointly

and **CASE 13–CC–2504**

PRS CONSTRUCTION, LLC

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for the General Counsel
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of Chicago, Illinois, for the Respondent

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on October 6, 2004 in Chicago, Illinois. After the parties rested, I heard oral argument, and on October 7, 2004, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1]

[1] The bench decision appears in uncorrected form at pages 71 through 88 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

At the start of the hearing, the General Counsel orally amended the Amended Complaint. For clarity, this Certification will discuss that amendment.

Additionally, this Certification will offer further analysis of the allegation, raised in paragraph VIII(e) of the Amended Complaint, that an object of Respondent's picketing was to force or require contractors that employed carpenters on the jobsite to recognize or bargain with Respondent even though the Board had not certified Respondent, under Section 9 of the Act, to be the representative of any employees of these contractors. This Certification will then proceed to the Conclusions of Law, Remedy, Order and Notice provisions.

The Amendment to Amended Complaint

As discussed in the bench decision, on October 4, 2004 the General Counsel issued a "Notice of Intention to Amend the Complaint at Hearing." When the hearing opened on October 6, 2004, the General Counsel amended the Amended Complaint in the manner described in the Notice of Intention. Respondent denied the new allegations.

Before the oral amendment, the Amended Complaint had included one factual allegation concerning picketing at the gate reserved for neutrals. This allegation, raised in Complaint paragraph VIII(a), alleged that from about July 19 to July 21, 2004, Respondents picketed at a location about 100 yards south of the neutral gate.

The oral amendment added an allegation that Respondent had picketed for a longer period, and at the neutral gate itself rather than merely within 100 yards of it. The oral amendment placed this new allegation in a newly–created paragraph VII(d), which stated as follows:

> From about July 19th to July 30th, 2004, Respondents, in support of their dispute with employers hiring carpenters, including but not limited to Ebenezer Construction and Grandee Diversified, described above in paragraph VI(a), picketed at Gate 2 with signs stating:
>
> > CHICAGO AND NORTHEAST ILLINOIS DISTRICT COUNCIL OF CARPENTERS LOCAL #916 AGAINST PRS CONSTRUCTION, LLC FOR A CONTRACT

The oral amendment did not delete the earlier picketing allegation, which remained in Complaint paragraph VIII(a). However, it did modify the legal conclusions alleged in Complaint paragraphs VIII(b) through VIII(e), and in Complaint paragraph IX, by making those allegations refer to the picketing described in the new paragraph VII(d) as well as the picketing alleged in the older paragraph VIII(a).

The evidence discussed in the bench decision certainly proves the picketing alleged in the new paragraph VII(d) by at least a preponderance of the evidence. Indeed, Respondent's only witness, Union Representative Bryan Long, admitted this picketing during his testimony. Therefore, I conclude that the government has proven that Respondent picketed at the neutral gate, as alleged in Complaint paragraph VII(d).

The PRS Project Superintendent, Ralph Ingold, credibly testified that on July 19, 2004, the pickets "migrated" to the intersection of Market Place Drive and Route 34 and had chairs at this location, which Ingold estimated to be between 75 and 100 yards north of Gate 2. He also testified that he also saw the pickets at this location on July 20 and 21, 2004.

Based on Ingold's testimony, I find that the General Counsel has proven that Respondent engaged in the picketing alleged in Complaint paragraph VIII(a) as well as the picketing alleged in Complaint paragraph VII(d). The government argues that when the pickets stationed themselves 100 yards from the neutral gate, that was close enough to raise the inference that Respondent was trying to enmesh neutrals in its dispute with PRS.

However, it is not necessary to decide whether 100 yards is close enough to the neutral gate to warrant such an inference. Such an inference may he drawn from the presence of the pickets at the neutral gate itself during the longer period of July 19 to July 30, 2004.

Before the oral amendment at hearing, paragraphs VIII(b) through VIII(e) referred only to the picketing alleged in paragraph VIII(a). The oral amendment at hearing modified these paragraphs so that they referred both to the picketing described in paragraph VIII(a) and to the picketing described in paragraph VII(d).

I conclude that the government has proven the allegations in the amended paragraphs VIII(b) through VIII(d) both as these allegations apply to the picketing described in paragraph VII(d) and also as they apply to the picketing described in paragraph VIII(a). Whether the General Counsel has proven the allegations raised in paragraph VIII(e) will be discussed next.

The Alleged Recognitional Object

Complaint paragraph VIII(e), as amended, alleges that an object of the picketing described in paragraphs VII(d) and VIII(a) has been to force or require contractors that employed carpenters on the jobsite to recognize Respondent as the carpenters' bargaining representative, even though the Board had not certified Respondent to be such a representative.

To prove this allegation, the General Counsel must establish both that Respondent's picketing had a recognitional object and also that Respondent was not the certified representative of the carpenters employed by the targeted contractors. I conclude that a preponderance of the evidence does not establish either of these elements and, accordingly, the government has not proven the allegations raised in paragraph VIII(a).

However, the government clearly has established the unlawful object alleged in paragraph VIII(c) of the Amended Complaint. The evidence also establishes that Respondent's picketing had encouraged the actions alleged in paragraphs VIII(b) and VIII(d). Therefore, for the reasons stated in the bench decision, I recommend that the Board find that Respondent violated Section 8(b)(4)(i)(B) and 8(b)(4)(ii)(B), as alleged in paragraph IX.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

CONCLUSIONS OF LAW

1. The Chicago Regional Council of Carpenters, previously known as the Chicago and Northeast Illinois District Council of Carpenters, is a labor organization within the meaning of Section 2(5) of the Act. Its affiliated local, United Brotherhood of Carpenters and Joiners of America, Local Union 916, is also a labor organization within the meaning of Section 2(5) of the Act.

2. The Charging Party, PRS Construction, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3. Ebenezer Construction and Grandee Diversified Service, Inc. are employers engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

4. By picketing at a construction site located at 1222 South Market Place Drive, Yorkville, Illinois (the "Yorkville jobsite") from about July 19, 2004 to July 30, 2004, with an object of forcing or requiring the Charging Party and other persons to cease handling or otherwise dealing in the products of employers who employ carpenters at this jobsite, including Ebenezer Construction and Grandee Diversified, and with an object of forcing or requiring the Charging Party and other persons to cease doing business with employers who employ carpenters at this jobsite, including Ebenezer Construction and Gradee Diversified, the Chicago Regional Council of Carpenters and United Brotherhood of Carpenters and Joiners of America, Local Union 916 violated Section 8(b)(4)(i) and (ii)(B) of the Act.

5. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Chicago Regional Council of Carpenters and United Brotherhood of Carpenters and Joiners of America, Local Union 916 did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found herein.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

ORDER

Chicago Regional Council of Carpenters and United Brotherhood of Carpenters and Joiners of America, Local Union 916, collectively referred to as the Respondent, their officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Picketing the Yorkville jobsite with an object of forcing or requiring the Charging Party or other persons to cease handling or otherwise dealing in the products of employers who employ carpenters at this jobsite, or with an object of forcing or requiring the Charging Party and other persons to cease doing business with employers who employ carpenters at this jobsite.

(b) In any like or related manner violating the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its offices in St. Charles, Illinois, copies of the attached notice marked "Appendix B"[3] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply with this Order.

Dated Washington, D.C.

Keltner W. Locke
Administrative Law Judge

[3] **If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD"** shall read **"POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."**

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This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that Respondent violated Section 8(b)(4) of the Act, as alleged.

Procedural History

This case began on July 28, 2004, when the Charging Party, PRS Construction, LLC, filed its initial unfair labor practice charge against Chicago and Northeast Illinois District Council of Carpenters, Carpenters Local Union 916. The Charging Party amended this charge on August 10, August 19 and September 28, 2004. For brevity, I will sometimes refer to the Charging Party simply as "PRS."

On August 23, 2004, after investigation of the charge, the Regional Director for Region 13 of the National Labor Relations Board issued a Complaint and Notice of Hearing. In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

On September 29, 2004, the Regional Director issued an Amended Complaint and Notice of Hearing. The third amended charge, filed the previous day, had amended the name of Respondent, and the caption of the Amended Complaint reflected that name change. Specifically, it identified Respondent as follows: Chicago Regional Council of Carpenters, formerly known as Chicago and Northeast Illinois District Council of Carpenters, and the United Brotherhood of Carpenters and Joiners of America, Local Union 916, individually and jointly. For brevity, I will refer to these organizations simply as "Respondent."

On October 4, 2004, counsel for the General Counsel issued a "Notice of Intention to Amend the Complaint at Hearing." When the hearing opened before me on October 6, 2004, in Chicago, Illinois, the General Counsel moved to amend the Complaint in the manner specified in this Notice. Respondent did not object and I granted the motion. Respondent then denied the allegations raised by the Amendment. For brevity, I will refer to the amended Amended Complaint simply as the "Complaint."

Also on October 6, 2004, after the parties rested, counsel presented oral argument. Today, October 7, 2004, I am issuing this bench decision.

Admitted Allegations

Respondent admitted a number of allegations in its Answer. Based upon those admissions, I find that the General Counsel has proven the allegations in Complaint paragraphs I(a), I(b), I(c), I(d), I(e), II(a), II(b), II(c), III(a), III(b), III(c), IV, V, VII(a), VII(b), and VII(c).

More specifically, I find that the government has established that the charge and amended charges were filed and served as alleged, that the Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, that Ebenezer Construction

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and Grandee Diversified Service, Inc. are also employers engaged in commerce within the meaning of Section 2(2), (6), and (7), that the unions collectively called "Respondent" are labor organizations within the meaning of Section 2(5) of the Act, and that at all material times, John Clearwater has held the position of business manager of Local Union 916 and has been its agent within the meaning of Section 2(13) of the Act.

Respondent also has admitted, and I find, that on or about mid–March 2004, the Charging Party established and maintained at its jobsite located at 1222 South Market Place Drive, Yorkville, Illinois, two entrances which the Complaint refers to as Gate 1 and Gate 2.

Respondent has also admitted that since about mid–March 2004, Gate 1, located at the southeast end of the jobsite, has had a sign stating:

NOTICE GATE NO. 1

THIS GATE IS RESERVED FOR THE EXCLUSIVE USE OF THE PERSONNEL, EMPLOYEES, VISITORS AND SUPPLIERS OF THE CONTRACTORS LISTED BELOW. THE PERSONNEL, EMPLOYEES, VISITORS, AND SUPPLIERS OF THE CONTRACTORS LISTED BELOW MAY ONLY USE THIS GATE:

PRS CONSTRUCTION, LLC
GRANDEE DIVERSIFIED SERVICE, INC.
EBENEZER CONSTRUCTION
AAA PESTROL EXTERMINATING
ALL CONSTRUCTION
GREEN THUMB LANDSCAPING
JAC'S COMMERCAIL CLEANING
J & D DOOR SALES, INC.
THE ROOF DEPOT
ANDERSON PLUMBING
MALIBU FLOORS
SES ENVIRONMENTAL, INC.
MSI COMMERCIAL
METAL SPECIALTY, INC.
BAILEY

Evidence presented during the hearing indicated that the sign first posted at Gate No. 1 did not list "Anderson Plumbing" or "Bailey." but instead omitted the name "Bailey" and showed another name on the line later used to list the name "Anderson Plumbing." Considering Respondent's admission together with this testimony, I find that at all material times since mid–March 2004, there has been a sign at Gate No. 1 which displayed the quoted language, except that the names "Anderson Plumbing" and "Bailey" did not appear on the initial sign, which displayed the name of another contractor in lieu of Anderson Plumbing.

Without objection, the General Counsel introduced a photograph of the Gate No. 1 sign. This photograph reveals one more line below the names of the contractors. This line states "ALL OTHERS MUST GATE NO. 2." Presumably, this means that all others must *use* Gate 2.

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Additionally, in the photograph, the contractor listed seventh appears as "JAC 'S COMMERCAIL CLEANING" with a blank space between the "C" and apostrophe and with the word "commercial" misspelled.

Complaint paragraph VII(c) alleges, and Respondent has admitted, that since about mid–March 2004, Gate 2, located at the northwest end of the jobsite, has had a sign stating:

> NOTICE GATE No. 2
>
> *THIS GATE MAY NOT BE USED BY THE PERSONNEL, EMPLOYEES, VISITORS, OR SUPPLIERS OR THE CONTRACTORS LISTED BELOW. THE CONTRACTORS LISTED BELOW, THEIR EMPLOYEES, VISITORS, PERSONNEL, AND SUPPLIERS MUST USE GATE 1 ONLY.*

The sign then listed the same names of contractors that appeared on the sign at Gate 1. In accordance with Respondent's admission, I find that since about mid–March 2004, Gate 2 has had a sign bearing the quoted language, except that initially, the name of another contractor appeared in lieu of "Anderson Plumbing" and the name "Bailey" did not appear.

The General Counsel also introduced into evidence a photograph of the Gate 2 sign. This photograph indicates that the seventh name on the list of contractors is "JACK'S COMMERCAIL CLEANING," with a "k" rather than a blank space between the "c" and apostrophe in "Jack's" and with "commercial" again misspelled.

Complaint paragraph VIII(a) alleges that from about July 19 to July 21, 2004, Respondents picketed at the corner of Route 34 and Market Place Drive, which is approximately 100 yards south of Gate 2 at a time when a reserve gate was properly established and maintained, with signs stating:

> CHICAGO AND NORTHEAST ILLINOIS DISTRICT COUNCIL OF CARPENTERS LOCAL #916 ON STRIKE AGAINST PRS CONSTRUCTION, LLC FOR A CONTRACT

Respondent's Answer denies that a reserved gate had been established properly but admits that it picketed on the dates alleged with signs bearing the language alleged. Based on these admissions, I find that Respondent did picket at the corner of Route 34 and Market Place Drive on July 19 to July 21, 2004, with picket signs bearing the language quoted in Complaint paragraph VIII(a).

Respondent's Answer disputes the location of the pickets, suggesting that they were 100 yards *north* of Gate 2, rather than 100 yards south. However, during his testimony, Union Representative Bryan Long admitted that the Union picketed at both gates for a period beginning in July 2004 and ending in August 2004. I find that the Union did picket at both gates during the period indicated by Long's testimony.

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Disputed Issues

To put the disputed allegations in context, I will begin with some background facts. In September 2003, PRS began work as the general contractor on a project in Yorkville, Illinois. PRS engaged a number of subcontractors to build an apartment complex called "The Reserve at Fox River." As already noted, a reserved gate system went into effect in March 2004.

Respondent sent PRS a July 7, 2004 letter which stated in part as follows:

> We have reason to believe that your company is employing carpenters at the above construction site who are paid below the area standard wage.
>
> * * *
>
> In the event that our information is incorrect, please provide us with documentation, which reflects the name of the entity, which is employing the carpenters and the payroll records, which reflect the hourly wages paid and the fringe benefit costs. In the event that we do not receive this information by the close of business on Friday, July 9, 2004, we must conclude that our information is correct.

PRS replied with a letter dated July 16, 2004, which stated as follows:

> In response to your letter to PRS, dated July 7, 2004, The Reserve at Fox River is not prevailing wage project. We, therefore, do not have information regarding the wages paid to the carpenters working on–site.

On about July 19, 2004, Respondent began picketing at both gates with signs stating, in part, "ON STRIKE AGAINST PRS CONSTRUCTION, LLC FOR A CONTRACT." Union Representative Bryan Long testified that the picketing continued at both gates for two to three weeks. Based on Long's testimony and the record as a whole, I find that Respondent continued picketing at Gate 2 for at least that long. Additionally, based on Long's testimony, I find that throughout this picketing, Respondent used signs stating that it was "on strike" against PRS, and did not use signs indicating that the Union was engaged in "area standards" picketing.

Essentially, two issues are in dispute. The first is the object of Respondent's picketing. The second is whether the neutral gate had been tainted. Before reaching these issues, it may be helpful to review Section 8(b)(4), which the Complaint alleges Respondent violated.

At the risk of over–simplifying a complicated part of the Act, the relevant portions of Section 8(b)(4) may be summarized as follows. Among other things, this section prohibits a labor organization from inducing or encouraging employees to engage in a strike or a refusal to make, handle or work on goods, or a refusal to perform services, where an object is to force any person to stop using certain products or to cease doing business with another person, or where an object is to force certain employers to recognize a union that is not the Board–certified representative of that employer's workers. Please note, however, that this description of the

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statutory language is very general and approximate, and the language itself is considerably more complex.

In essence, the Complaint alleges that an object of Respondent's picketing was to force PRS to cease handling or dealing in the products of subcontractors that employed carpenters on this jobsite and to cease doing business with those subcontractors. Additionally, the Complaint alleges that an object of Respondent's picketing was to force these same subcontractors to recognize or bargain with Respondent as the representative of the employees of these employers, even though Respondent had not been certified as the representative of such employees under the provisions of Section 9 of the Act.

Customarily, in discussing Section 8(b)(4), employers are divided into two categories. The employer with which the union has a dispute is called the primary employer. Companies with which the union does not have a dispute are called secondary employers. With some exceptions, a union may picket the primary employer wherever that employer has a "presence," even if secondary employers also are present. However, when the primary employer is not present but the union pickets a secondary employer anyway, that action suggests a proscribed object.

When both the primary employer and secondary employers have employees working on a construction site, it might appear that a union could picket the site because of the primary's "presence." In practice, it's somewhat more complicated. If the primary and its subcontractors may only enter or leave the site through a separate gate reserved for their use, a union manifests an unlawful object when it pickets at a gate reserved for other contractors. However, if the primary's employees go in and out through the gate reserved for the neutral employers, that presence "taints" the gate. Picketing a "tainted" gate does not demonstrate an unlawful object.

The Board summarized this principle in *Golden Stevedoring Co., Inc.*, 335 NLRB 410 (2001). After noting that the Act protects a union's right to picket an employer with which it has a dispute, the Board continued:

> Other employers sharing a common situs with the primary employer may be insulated from the disruption of the labor dispute by establishing "neutral" gates, i.e., gates reserved for the employees of the employer not involved in the labor dispute. So long as the employees of other employers enter through neutral gates, the union may not picket the neutral gates. Neutral employers are insulated from the picketing, however, only so long as the reserve gate system is faithfully observed. If employees of the struck employer enter through a neutral gate rather than a gate designated for them, the neutral gate is considered "tainted" and a union may lawfully engage in picketing at that gate. See *J. F. Hoff Electric Co. v. NLRB*, 642 F.2d 1266, 1269–1271 (D.C. Cir. 1980), cert. denied 451 U.S. 918 (1981).

335 NLRB at 414.

Respondent argues that it lawfully could picket at Gate 2, which was reserved for neutrals, because that gate had been tainted. More specifically, Respondent contends that PRS

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caused a person termed the "gatekeeper" to be present at the neutral gate; because a person associated with PRS was (or had been) present, Respondent contends, it could engage in lawful primary picketing at this location.

Before focusing on whether the gate was "tainted," it is appropriate to consider Respondent's other argument, that it picketed for a lawful object. Proving the existence of a lawful object does not rule out the possibility that the Respondent had an unlawful object as well, but the existence of a lawful object at least offers a legitimate reason for the picketing. Therefore, examining the Respondent's asserted object is a good starting place.

Respondent asserts that its object was to engage in "area standards picketing" to publicize that certain employers on the site were not paying their carpenters the "prevailing wage." For several reasons, I reject Respondent's argument that it was engaged in area standards picketing. As Union Representative Long admitted, the picket signs never indicated an area standards dispute. Rather, at all times, the signs stated that Respondent was "on strike" against PRS.

Typically, picketing with a sign bearing "on strike" language at an untainted gate reserved for neutrals is consistent with a cease–doing–business object, in part because delivery drivers may refuse to cross such a picket line. Such an interruption of deliveries would affect the neutral secondary employers on the site. In the present case, Respondent notes that the record does not establish any interruption of deliveries. However, the "on strike against PRS" language still seems somewhat disingenuous because the record does not establish that Respondent represents any PRS employees. Thus, Union Representative Long testified as follows on cross–examination:

> Q And which employees of PRS do you claim to represent?
> A The carpenters.
> Q And how many carpenters are employed by PRS?
> A Unknown.
> Q Which employees did you claim had an interest in joining your union?
> A The carpenters.
> Q Which carpenters?
> A The carpenters on the job.

However, the PRS project superintendent, Ralph Ingold, credibly testified that PRS did not employ any carpenters at this jobsite. Respondent presented no evidence to contradict this testimony. Moreover, Respondent did not present evidence establishing that it had a reason to believe that PRS employed carpenters on the jobsite. In this light, Long's claim that Respondent represented carpenters employed by PRS seems hollow at best.

In oral argument, Respondent contended that PRS had led the Union to believe that PRS employed carpenters on the jobsite. However, Respondent did not present any credible evidence to support this assertion.

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The timing of events also casts doubt on Respondent's claim that it was engaged in area standards picketing. Respondent introduced a September 17, 2004 letter from an official of the Illinois Department of Labor. This official expressed the opinion that the Yorkville construction project "is a project covered by the Illinois Prevailing [Wage] laws."

Significantly, this letter replied to Respondent's letter dated August 6, 2004, which was 18 days *after* Respondent began picketing. The record does not establish that Respondent made any earlier inquiry to the Illinois Department of Labor. Therefore, I must conclude that Respondent began picketing well before it had reason to believe that contractors at this jobsite had an obligation to pay prevailing wage rates.

For this reason, I do not conclude that Respondent picketed for the "prevailing wage" reason it has asserted. The fact that Respondent picketed for some reason other than the one it claimed also suggests that the real object was unlawful.

Respondent's picketing at Gate 2 would not manifest an unlawful object if the presence of PRS employees or associates had "tainted" that gate. Respondent only called one witness, Union Representative Long. He testified, in part, as follows:

> Q And. . .for a period of time in July and concluding in August of 2004 the Union engaged in picketing of both gates, is that true?
> A That is correct.
> Q And why did the Union picket Gate 2, the so–called neutral gate?
> A Because the gate was being tainted.
> Q And when you say "tainted," what do you mean?
> A Employees that were not supposed to cross the gate were crossing it.
> Q Which employee?
> A Of PRS, secretary.

However, on cross–examination, Long admitted that he had never spoken with this person or had any other dealings with her. His testimony provides no basis for the conclusion that she was a PRS secretary.

Based on my observations of the witnesses, I credit the testimony of Project Superintendent Ingold and rely on it in finding that the person who opened and closed Gate 2 worked for a temporary agency, which provided this individual under a contractual arrangement with PRS.

There certainly are circumstances in which an employer sets the terms and conditions of employment of a contingent worker provided by a temporary employment agency to such a great extent that the contingent worker cannot be considered an independent contractor. The present record does not disclose the extent to which PRS supervised the individual provided by the temporary service. Therefore, the question arises as to which party bears the burden of proof on this issue.

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In some other contexts, the Board has held that the party asserting that an individual falls outside the statutory definition of employee bears the burden of proving it. See, e.g., *AgriGeneral L.P.*, 325 NLRB 972 (1998)(party asserting that an individual is an exempt agricultural worker bears the burden of proof); *Community Bus Lines/Hudson County Executive Express*, 341 NLRB No. 61 (March 26, 2004)(burden of proving that an individual is an independent contractor falls on party asserting it).

On the other hand, the presence of pickets at a gate reserved for neutrals creates an inference of unlawful object which the picketing union must dispel. In *International Brotherhood of Electrical Workers Local No. 970 (Interox America)*, 306 NLRB 54 (1992), the Board, quoting *Iron Workers Local 433 (Robert E. McKee, Inc.) v. NLRB*, 598 F.2d 1154, 1159 (9th Cir. 1979), stated that "a heavy burden [is placed] on the picketing union to convince the trier of fact that the picketing was conducted in a manner least likely to encourage secondary effects."

Based upon the *Interox America* decision, I conclude that the Union bears the burden of establishing that the neutral gate had been tainted and that this burden carries the subsidiary burden of proving that an individual who assertedly "tainted" the gate had a close enough relationship to the primary to do so. Further, I conclude that Respondent has not established that the unnamed "gatekeeper" was so closely associated with PRS that her presence at the neutral gate "tainted" it.

In *Sailors' Union of the Pacific AFL (Moore Dry Dock Company)*, 92 NLRB 547, 549 (1950), the Board stated that picketing at a common situs is presumptively lawful if: (a) the picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises, (b) at the time of the picketing the primary employer is engaged in its normal business at the situs, (c) the picketing is limited to places reasonably close to the location of the situs, and (d) the picketing discloses clearly that the dispute is with the primary employer. The Board lists these criteria in the conjunctive, so the presumption arises only when all are satisfied.

As Respondent noted in oral argument, and as the Board stated in *IBEW Local 323 (Renel Construction, Inc.)*, 264 NLRB 623, 624 (1983), "The Board consistently has emphasized that the guidelines are not to be mechanically applied. . ." The Board further stated:

> Where a reserved gate system has been properly established, the Board's analysis with respect to *Moore Dry Dock's* third condition focuses on the proximity of the picketing to the reserved gate rather than to the primary employees' work location. Thus, the Board has observed that a properly established system of separate gates requires a union to confine its picketing to the reserved gate, and that picketing which is conducted away from the reserved gate may indicate noncompliance with *Moore Dry Dock*.

264 NLRB at 624 (footnotes omitted).

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In the present case, Respondent has admitted that it picketed at the neutral gate for two to three weeks. The presence of pickets at the neutral gate for so long a period cannot be regarded as isolated or de minimis. Therefore, I conclude that Respondent's picketing does not enjoy the presumption of lawfulness which compliance with the *Moore Dry Dock* standards would bring.

In sum, I infer that Respondent acted with an unlawful object because its picketing failed to comply with the *Moore Dry Dock* criteria, because the presence of its pickets at the neutral gate created an inference of unlawful object, and because its asserted reason for the picketing appears to be pretextual. Concluding that the General Counsel has proven all allegations in the Complaint, I recommend that the Board find that Respondent violated Section 8(b)(i)(4)(B) and 8(b)(ii)(4)(B) of the Act as alleged.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout the proceeding, all counsel have demonstrated high standards of professionalism and civility, which I appreciate. The hearing is closed.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and abide by this notice.

WE WILL NOT picket the construction site located at 1222 South Market Place Drive, Yorkville, Illinois, with an object of forcing or requiring the Charging Party or other persons to cease handling or otherwise dealing in the products of employers who employ carpenters at this jobsite, or with an object of forcing or requiring the Charging Party and other persons to cease doing business with employers who employ carpenters at this jobsite.

WE WILL NOT in any like or related manner violate the National Labor Relations Act.

CHICAGO REGIONAL COUNCIL OF CARPENTERS
(Respondent)

Dated: _____ **By:** _____
(Representative) **(Title)**

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, LOCAL UNION 916
(Respondent)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

200 West Adams Street, Suite 800, Chicago, IL 60606–5208
(312) 353–7570, Hours: 9:30 a.m. to 6:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353–7170.